THE RECALL OF DECISIONS

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The United States and each state in the Union is governed by a written constitution, which limits the powers of the officers who conduct the government and defines the rights of the citizen. The Constitution of the United States also draws the line between the powers of the federal government and the powers of the several states. It is inevitable that questions should arise between state and nation, between the states and their citizens, and between individuals as to the construction of these constitutions, and some man or body of men must decide these questions or our system breaks down. Hitherto they have been decided by the courts, but it is now proposed that from their decisions an appeal should be taken to the people. Is this a reasonable proposal?

It will be conceded generally that the law which controls us all should be certain so that every man can rely on it and govern himself accordingly; that courts should be no respecters of persons but should treat rich and poor, popular and unpopular alike, and that in order to secure such courts the judges should be wise, upright, courageous and impartial. No lover of justice can dispute any of these propositions.

It must also be remembered that constitutions are laws adopted by the people as a whole to define the power of their rulers and to protect and secure the rights of minorities and individuals. Power can always guard itself and needs no protection, whether it rests on tradition, on military force, or on mere numbers. It is the weak and not the strong, the few and not the many who are in danger. The successive victories of liberty in the long contest against tyranny have always resulted in securing for the citizen some constitutional safeguard like Magna Charta, the Act of Settlement, the various provisions which are found in all our written constitutions, or the amendments adopted after the Civil War. The words which secure religious liberty, the right of petition, or the freedom of the press are not necessary to protect the man who agrees with the majority

of his neighbors, but him who disagrees—him who is a Catholic in a Protestant country, him who would petition for the abolition of slavery when its friends control the government, him who would preach some doctrine which the majority disapproves. As Mr. Hornblower has put it, "Civilization consists in subordinating the wishes of the majority to the rights of the minority." The protection which our constitutions give to the life, liberty and property of every citizen is a protection against abuse by the officers chosen by a majority of his fellow-citizens, and there are few of us, whether laborers or capitalists, who would feel safe were these constitutional safeguards taken from us. In a word a constitution is a law adopted by the people to protect each citizen against oppression by a majority of the people themselves or by the officers which this majority chooses. This is its main purpose.

These propositions are fundamental, and unless we would do away with constitutions altogether and make the majority of the moment omnipotent in dealing with our lives and property, any discussion must proceed upon this basis.

The recall of decisions may be limited to those decisions which involve a construction of the constitution, or it may include those which lay down a legal rule that concerns the public generally, or it may extend to all decisions. If the principle is once established, no one can say to what class of decisions it will not be extended. Its more intelligent advocates insist that it will be used only to amend state constitutions by reversing decisions which hold particular statutes inconsistent with such constitutions, but they cannot control the movement thus inaugurated. It is easy to set a fire which the incendiary cannot extinguish.

Why should we adopt this new political nostrum? We have gone on for a century and a third under the existing system. It has carried us safely through the formative period when the government was young, through periods of financial disaster, through the great Civil War and the critical days of reconstruction, through fair weather and foul in a way which has excited the admiration of mankind, and we have all been proud of it as the most successful instance of self-government on a great scale and under most diverse conditions in the history of mankind. Why should we change? What is the ground of complaint? If our opponents are driven to precise statement it will be found that the system as a rule has worked to the

entire satisfaction of the people, but that in a few states and in a few cases courts have made decisions which are not palatable to these advocates of change. This may be admitted, for all men are fallible, and under any system it is impossible to satisfy everybody. But shall we for a few mistakes destroy a system which as a rule works well?

Let us go a little further. The recall of decisions, at first limited by its author to the recall of decisions made by state judges in construing state constitutions, has now been given a wider scope and is advocated by its friends on the ground that all courts defeat the will of the people when they declare an act unconstitutional, and that it is dangerous to give a few men so great a power. These critics work themselves into a frenzy over the danger to free institutions arising from the courts, and as one writer expresses it:

> If we the American people are not willing to let the federal judiciary prove to be our Frankenstein monster, uncontrollable and destructive, we must uphold and act upon the doctrine of Thomas Jefferson, the great American whose democracy was pure and undefiled. He wrote to Jarvis: "It is a very dangerous doctrine to consider the judges as the ultimate arbiters of all constitutional questions. . . . . The constitution has erected no such single tribunal. . . . . It has made all the departments co-equal and co-sovereign with themselves."

This may seem like a convincing statement to some, but let us analyze it and see if there is really danger that the federal judiciary will prove "a Frankenstein monster, uncontrollable and destructive."

No one will doubt that a constitution, in every case which we need consider, imposes some limits on the powers of the legislature and the executive. There are some things which neither can do. For example the legislature cannot interfere with the freedom of religious worship, and the governor cannot order a man killed without a trial. When we approach the border line questions arise which it may be difficult to decide. If we concede that the legislature may determine for itself all questions as to its own power, and that the passage of an act is a decision that it has the power to pass it, there ceases to be any limitation on the legislative power. If the governor may insist that he has power to do whatever he chooses to do, and that no one can question it, the constitutional limits on his power lose all their force. These propositions admit of no dispute. There is no alternative save the decision of such questions by the court.

Let us next ask what the judges do when they decide an act un constitutional. They do not issue a decree when the law is passed setting it aside and staying its execution. Unless the question is raised in some litigation they express no opinion, but when a case comes before them in which one party claims a right under some statute, and the other says that the statute was one which the legislature had no power to pass, they deal with the issue thus raised. It being conceded, as it must be, that the legislature of the day has no power save that which the people gave it by the constitution, the question before the court is, "What is the people's will?" Their will as expressed in the constitution must prevail for that is the fundamental law, and the court in interpreting the constitution and applying it to the statute, so far from defeating the people's will, is endeavoring to carry it out. In so doing it is the court, not the legislature, which best represents the people.

I cannot state the proposition as well as Chief Justice Marshall stated it in Marbury *vs.* Madison:

> If two laws conflict with each other the courts must decide on the operation of each. So, if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution, or conformably to the constitution, disregarding the law, the court must determine which of these conflicting rules governs the case. . . . . Those, then, who controvert the principle that the constitution is to be considered in court as a paramount law are reduced to the necessity of maintaining that courts must close their eyes on the constitution and see only the law. This doctrine would subvert the very foundation of all written constitutions. It would declare that an act which, according to the principles and theory of our government, is entirely void is, yet, in practice, completely obligatory. It would declare that, if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits and declaring that these limits may be passed at pleasure.

It is always certain that the losing party and some others will quarrel with the decision, and it is possible that the interpretation which the court gives to the words of the constitution may not be approved by the majority of the people. They may say, "If that is what the constitution means, we do not like it." Is the court an uncontrollable monster from whose decree there is no relief? On the contrary the people have only to change the constitution by amend-

ment, as they have done several times recently with the Constitution of the United States, and are constantly doing with the constitutions of the states. The people can wipe out the whole constitution, can adopt socialism or even anarchy, can obliterate all rights of property, all freedom of speech if they wish, and the courts are of all men the least able to prevent it. The courts tell the people what their law means, and the people if they are dissatisfied have full power to make a new law which will satisfy them better.

Let us take another step and examine Jefferson's theory that each department of government may construe the constitution for itself, and its decision be binding. Does anyone really think that the quiet and generally elderly gentlemen who compose our courts, and who have no power to enforce their decrees save as the executive aids them, are more dangerous Frankensteins than an uncontrolled President, or a lawless Congress would be? Are three Frankensteins safer than one? The judiciary is notoriously the weakest department of our government. Its power comes from its wisdom and its character, and is purely moral. Not so with the executive and the legislative branches which control the purse and the sword.

Questions of constitutional interpretation must arise between Congress and the President, as in the time of Andrew Johnson. More conflicts may come in the future, and if each can interpret the Constitution finally, there is no way out of the conflict. It is not safe to let a headstrong president define his own powers at pleasure, or a legislative majority in times of popular excitement legislate at will. Some one must decide such questions, and the only possible arbitrators are the courts. If they are shorn of their power, there is no constitutional limit upon executive or legislative power—in short there is no constitution. If they make law which the people do not like, the people can change it after due deliberation. The ultimate power is with them. This is democracy pure and simple.

Jefferson's three Frankensteins, or even one of them if the President is the one, may well mean civil war as might have been the case when the Hayes-Tilden controversy arose. The Frankenstein that can send the troops and ships of the United States to prevent Colombia from asserting its rights in its own territory, or can send soldiers to quell a riot in any city, is a far more dangerous Frankenstein than any court in the United States. Shall we, with this in view, abandon the ways which we and our fathers before us have trodden so long in safety?

But it is conceded by the advocates of the recall that the people have the power to amend the constitution and so change any interpretation of its provisions by the courts, but they say it is a cumbrous process, that it is slow in its operation, that its outcome is uncertain, and that it is difficult to draw an amendment which is entirely satisfactory, a difficulty encountered in New York in the effort to change the constitution so as to impose on employers a liability for accidents to employees.

If the process is slow, it is because the founders of this government wisely decided that it should not be too easy for a popular majority to change the fundamental law which regulates the powers of the governor and the rights of the governed. There is no one who has not had occasion to realize the wisdom of "sleeping on" a proposition before acting. Our system makes the people "sleep on" a proposed amendment before adopting it, and this spells safety. There are few if any constitutional changes which cannot safely wait the sober second thought of the voters, and if in any state the process of amending the constitution is bad, the process itself can be changed by amendment.

It is said that of many amendments proposed only few have been adopted. The fault is not with the process of amendment but with the amendments themselves. There has been no difficulty in carrying amendments which the people wanted. The difficulty has been with those that the people did not want, and that this difficulty exists is an argument in favor of the present method. As for the difficulty in drawing an amendment, what stronger argument can we have against the proposed change? If skilful men with ample time at their disposal cannot express in writing what they mean, is it not clear that their minds are not in accord and that they do not know what they want, or perhaps that they recoil from the amendment when they see it in black and white? If we cannot reduce the law to a written statement, where shall we be left by a popular election recalling a decision, and what will the law then be? It is impossible to foresee the extent of the resulting confusion.

The arguments against the recall of decisions are numerous. In the first place how would the process affect the certainty of the law, which is most important, as was stated at the beginning of this article? Today we find the law in the text of the constitution and the statute. We are aided in its interpretation by the history of

the provisions in question, and by the decisions of eminent and able judges and the precedents which their labors have established, and with these to help him the lawyer who is called upon to advise a client as to his right can with some confidence tell him what they are. If the recall of decisions is adopted he must say, "This in my judgment is the law as the court will lay it down, but after its decision the other side may start an agitation for a recall and no one can tell what the result of a popular election will be." The client will be as much at sea as would be the patient if he found that the remedies prescribed by his doctor were subject to be changed, if the public after hearing various quacks decided by a majority vote that the diagnosis of his doctor was wrong.

Let us pursue the client's difficulties a little further, and suppose he is sued. Shall he settle the claim or not? His lawyer must say that "while in the courts you will win, you must incur the expense of defending yourself there, and afterwards of conducting a popular campaign before you are safe. What that expense, or what the result of the election will be, who can tell?" If it be said that the recall is not to affect the judgment so far as the rights of the parties to the case are concerned, what is the position of the losing party, bound by a judgment which as to the public and all other parties is held by the people to be wrong? There is then one law for the unhappy man who raised the question and incurred the expense, and another law for all his fellow-citizens. Suppose the amount in a case is small but the principle involved affects a great many: must the persons interested form a party and raise a campaign fund to sustain a decision or reverse it at the polls? The imagination fails to grasp all the possibilities and uncertainties of law made in such a way.

It is conceded also that the law should be no respecter of persons. Suppose a constitutional fight is claimed by a Rockefeller in a dispute with some laborer, can we be sure that the people will not decide against Rockefeller's contention because he is rich, and can afford to lose his case? This is the reasoning which juries often use in deciding suits for personal injury, and their logical processes are those of the community at large. Suppose next year a poor man claims the same constitutional right against a rich neighbor, will not the poor man be likely to prevail for the same reason, and then which election makes the constitution? Is one popular election to settle rights for all time, or may it be overruled by the same voters or their descendants at another election?

Again the courts in deciding often leave questions open for future consideration, and it is doubtful how far their decision is intended to go. Will not the same or greater doubts be left by popular elections? Our opponents say that the opinions of the court are "only literature, impressive, helpful, more or less persuasive, but not of themselves law." Yet it must be confessed that they state the rules which the courts will follow in like cases; that they tell us what the law is, and guide us in other cases. What shall take their place when a decision is recalled? Shall we interpret the result by the speeches of irresponsible orators on the stump, or by appeals made in campaign documents? What a vista of hopeless confusion and uncertainty the suggestion opens!

Moreover when the question is presented to the voters whether they wish a particular law to stand although it violates the constitution, they are really asked whether they want to override the constitution in this case. It is only an abuse of terms to call it amending the constitution, for it is not suggested that the provision of the constitution violated in that case is to be treated as absolutely repealed. To illustrate my meaning, let me call attention to the constitutional rule that no man can be deprived of life, liberty or property save by due process of law. When a number of lawyers were trying to frame an amendment to the constitution of New York which should make possible an employer's liability law of an extreme character, and were contemplating their completed work, one said, "This does not seem to me entirely satisfactory." "No wonder," replied another, "what we have done in substance is to make the constitution provide that no man shall be deprived of his property save by due process of law except employers of labor." The story may be true or false, but it is clear that while no one would probably advocate the repeal of the general provision, he might very well support a particular law without recognizing that it violated that provision. Laborers might be willing to deprive their employers of rights which they would insist on preserving for themselves, just as the labor unions object to any combinations of capitalists that may tend to monopolize trade or prevent competition, while they strenuously insist that they shall have the right to form combinations against their employers with the same object.

When the constitution is amended under the present system each voter has a chance to consider how he would like the new rule

in his own case, and to forecast the contingencies to which it might apply, knowing that he cannot make a rule which will affect others without its affecting him also. But in deciding whether to recall the decision in favor of a rich man he will not realize that he is making law for himself, nor if the election only validates a particular statute will it perhaps affect him. If the recall is adopted, there will be no settled rule which the majority of voters may not set aside in a given case at pleasure.

Again if the majority can recall a decision and so by a majority vote amend the constitution, where is the protection now afforded minorities and individuals? The very object of the constitution is to restrain the power of the majority and to protect the rights of the individual against its tyranny. This object is defeated if a majority of the voters is given the power to invade these rights at pleasure. It is not necessary to speak of the feelings aroused by differences of religion, or wealth, or the antagonism between labor and capital, though all are very easily aroused. Consider only the effect of race prejudice, today the most dangerous influence at work in our midst. Only a few years ago I heard an eminent Hebrew in New York say that the lives and property of his race were safe nowhere save in England and the United States. The Dreyfus case was then shaking the government of France, and the expulsion of the Jews from Russia and their treatment in other countries were fresh in men's minds. It is possible that a similar feeling might be raised against them in parts of the United States, for we are of flesh and blood in no way different from other men, and in that case how safe would they be with no constitutional protection? Ten millions of our fellow-citizens, our equals before the law in every respect, are now suffering outrages and indignities of all kinds in every part of the country because their skins are darker than our own. They are denied the right to vote, they are denied in some places the right to live where other citizens may live, their lives are taken without due process of law. The constitution affords them their only protection. Can their rights safely be left to be dealt with as pleases a majority of their fellow-citizens in many states? To ask the question is to answer it.

Lastly we may be sure that while men are men disputes between them will constantly arise, and somehow, by somebody, they must be decided. As civilization has advanced, the old-fashioned ways of

settling those questions by might, by wager of battle, or various ordeals have been abandoned, and instead it is agreed that the best way of settling all controversies is by submitting them to impartial men, who after hearing the parties shall decide what is right. Even in the international field, enlightened men of all nations are agreed that the settlement of questions by the majority on the battlefield must cease, and that such disputes must be adjusted by The Hague tribunal or some like body of trained jurists. It would be absurd to propose that an election should be held in which the contending nations should vote and a majority decide, for that would make Russia supreme in Europe and the smaller nations would be placed at the mercy of their larger neighbors. What is so manifestly absurd as a method of settling questions between nations is hardly less so if applied to disputes between individuals. It is clear that in an international controversy each voter would stand by his own country, and therefore an election would be a farce. Is it not equally clear that if the constitutional or other question involved in a decision were of such popular interest as to suggest the recall, the voters in deciding it would stand by their own class, their own color, their own party, their own locality, just as Russians would stand by Russia and Frenchmen by France? That if the election for example turned on a decision as to the respective rights of labor and capital, or any like question on which feeling was strongly aroused, the result would be influenced by prejudice and sympathy, and that the feeling not the reason of the voters would determine the result? So far from having their rights fixed by an impartial tribunal, the parties would be sent from that tribunal to fight out their differences at the polls, and the strong side, not necessarily by any means the right side, would prevail. It is not right, but might which would decide the contest, and thus in cases of the greatest importance to the public our whole method of deciding controversies by disinterested men would be abandoned, and instead, the result of a contest between the parties, in which the most numerous would win, would be registered as law. We struggle to get juries in all important cases made up of men who can have no prejudice or opinion on the questions involved. If the recall prevails the tribunals which make our law will be governed by prejudice. Can anything more inconsistent with the orderly administration of justice or anything more contrary to all civilized procedure be imagined?

In a word we labor to secure wise, courageous and impartial judges trained for their work by years of study and experience to decide the disputes which arise among men, and it is proposed that from the decisions of such men an appeal shall lie to the people, an appeal from knowledge to ignorance, from impartiality to prejudice, from ripened experience to inexperience, from the serene atmosphere of the courtroom to the declamation and passion, the noise and the dust of the hustings.

But it may be said that in a different way the people can accomplish the same result since they can amend the constitution. That is true and I would not take away or fetter this absolute power. But its exercise is now regulated in such a manner as to insure deliberation, and as far as possible to present a general rule and not a particular case for consideration. Even in courts "hard cases make shipwreck of the law," and this danger would be increased a hundred fold if the people were given power to decide in each case whether or not to uphold the constitution. There is power enough now, and it is properly guarded. Let well alone.

Nor is the process of amendment slow or difficult. Between 1880 and 1911 the people of Massachusetts have adopted twelve amendments to the constitution of the state. This necessitates the adoption of the amendment by two successive legislatures and its ratification by vote of the people, but in no case has the process occupied two years. It may be doubted whether amendment by the recall of decisions would be more expeditious. It certainly ought not to be, and if other states have more cumbrous methods, they can adopt the Massachusetts rule. To be sure in Massachusetts elections are annual, while in most states the legislatures are chosen biennially. The annual session was abandoned because the people did not like to have the legislature so often in session, in fact did not trust their representatives thoroughly. The biennial session may delay the process, but it is strange that communities which in this way have shown their distrust of legislative action should now assume that if a law which such a legislature has passed is held unconstitutional, the people's will is defeated. Is the legislature, that cannot be trusted to meet every year lest it abuse its power, so infallible an interpreter of the people's will that our whole constitutional system must be changed and our constitution in fact abolished in order to give its laws more immediate effect? If skilful draftsmen cannot

write an amendment to the constitution which satisfies them, will the constitution be amended better by the loose language of a statute drawn as most of our statutes are? Such will not be the judgment of intelligent men.

Senator Root has stated the question admirably in the following words:

> We must choose between having prescribed rules of right conduct, binding in every case so long as they exist, even though there may be occasional inconvenience through their restraint upon our freedom of action, and having no rules at all to prevent us from doing in every case whatever we wish to do at the time. . . . . A sovereign people which declares that all men have certain inalienable rights, and imposes upon itself the great impersonal rules of conduct deemed necessary for the preservation of those rights, and at the same time declares that it will disregard those rules whenever in any particular case it is the wish of a majority of its voters to do so, establishes as complete a contradiction to the fundamental principles of our government as it is possible to conceive. It abandons absolutely the conception of a justice which is above majorities, of a right in the weak which the strong are bound to respect.

In a word it abandons our whole theory of constitutional government. It is difficult to believe that the people of the United States are ready yet to adopt this suicidal policy.